

No. 14,328

United States Court of Appeals
For the Ninth Circuit

BETTY GULLEY,

Appellant,

vs.

MARY JANE GULLEY, also known as
Mary J. Gulley, now Mary Jane
Wauson, and UNITED STATES OF
AMERICA,

Appellees.

Upon Appeal from the District Court of the United States
for the District of Nevada.

BRIEF OF APPELLEE

MARY JANE WAUSON, FORMERLY MARY JANE GULLEY.

RIDLEY C. SMITH,

Suite 202, 114½ West Fourth Street, Santa Ana, California,

OLIVER C. CUSTER,

220 South Virginia Street, Reno, Nevada,

Attorneys for Appellee

Mary Jane Wauson,

formerly Mary Jane Gulley.

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BRIEF OF APPELLEE

MARY JANE WAUSON, FORMERLY MARY JANE GULLEY.

STATEMENT OF FACTS.

On April 12, 1950, the Board of Veterans Appeals made its decision and final determination wherein it held that Mary Jane Gulley one of the appellees herein, was the beneficiary of the National Service Life Insurance policy of her deceased husband Wallace Phillip Gulley.

Betty Gulley the mother of the deceased being dissatisfied with the ruling of the Veterans Administration Board of Veterans Appeals, thereupon filed in the U. S. Court for District of Nevada an action claiming that she was the beneficiary of said policy, rather than the said Mary Jane Gulley.

The policy involved was taken out while the said Wallace Phillip Gulley was a single man. He thereafter married the defendant herein, Mary Jane, on October 15, 1946 in Los Angeles County, California and died August 13, 1947. On or about the 29th day of January 1947, the said Gulley had a conversation with his wife Mary Jane and told her that he intended to change his National Service Life Insurance Policy and make her the beneficiary thereof, she having made him the beneficiary of a group insurance policy which she held by reason of her employment (Defendant's Exhibit "B" Tr. 57) on or about that date. Approximately two months before his death, which would be around the month of June 1947, there was another conversation between Wallace and Mary Jane Gulley, his then wife, concerning insurance and at that time he told her, "I do have \$10,000.00 government insurance in your name" (Tr. 59). He also advised his friend in the Marine Corps, Neil Baker, that he had \$10,000.00 National Service Life Insurance and that he had changed the former beneficiary thereof to his wife Mary Jane.

The appellee Mary Jane introduced in evidence the original "Confidential Statement" executed by the then Corporal Wallace Phillip Gulley at the U.S.

Marine Corps Air Station, El Toro, California, on February 5, 1947 (Defendant's Exhibit "A" Tr. 61).

The appellant relied upon the original insurance policy which was introduced in evidence, she did not introduce any documentary or any oral evidence to show that her son had again named her as beneficiary of his National Service Life Insurance after having named his wife as the beneficiary.

THE PLEADINGS.

Complaint was filed in the U. S. District Court for the District of Nevada on May 26, 1950 (Tr. 3) and the answer of the appellee Mary Jane Gulley (Wauson) was filed October 17, 1950. The order on the pre-trial conference appears in the record (Tr. 10-12). Judgment was entered in favor of Appellee Mary Jane Gulley (Wauson) by the U. S. District Court on January 29, 1954 (Tr. 24, 25, 26).

STATEMENT OF THE CASE.

The question before this Court is whether or not the Appellee Mary Jane Gulley (Wauson) has established the requirements to entitle her to judgment that she is entitled to the proceeds of the National Service Life Insurance Policy by:

1. An intent on the part of decedent to make his wife the beneficiary of the policy.

2. An affirmative act on the part of the decedent Wallace Phillip Gulley to change the beneficiary of his insurance policy so as to make his wife the beneficiary.

ARGUMENT.

1. APPELLANT CONTENDS IN HIS FIRST SPECIFICATION OF ERROR, THAT THE COURT UNDULY LIMITED THE CROSS-EXAMINATION OF THE DEFENDANT MARY JANE GULLEY (WAUSON).

It is respectfully submitted that the trial Court's ruling was correct and the objection was properly sustained.

“Introduction of irrelevant evidence upon one side without objection does not justify the introduction of irrelevant evidence on the other side.”

San Diego Land etc. v. Neale (1888), 78 Cal. 63, p. 76, 20 Pac. 372, 3 L.R.A. 83;
20 *Am. Jur.* 262.

2. APPELLANT'S SECOND SPECIFICATION OF ERROR WAS THAT THE COURT IMPROPERLY SUSTAINED OBJECTIONS TO QUESTIONS ASKED THE WITNESS VIRGINIA BARBEE (TR. 77-78).

It is submitted that the trial Court ruled correctly in sustaining the objections.

San Diego Land, etc. v. Neale (1888), 78 Cal. 63, p. 76, 20 Pac. 372, 3 L.R.A. 83;
20 *Am. Jur.* 262.

3. ALTHOUGH NOT CLEARLY INDICATED IN APPELLANT'S BRIEF IN WHICH IS SET OUT THE SPECIFICATION OF ERRORS, IT APPEARS THAT APPELLANT'S MAIN CONTENTION AND SPECIFICATION OF ERROR IS THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S DECISION, SET FORTH AS ITS CONCLUSION OF LAW NO. 1 (TR. 22).

It is elementary that where there is evidence sufficient to support the findings and judgment of the trial Court, that they will not be disturbed on appeal.

Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. provides that in an action tried without a jury, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Judge to judge the credibility of the witness."

Boring v. U. S., 181 F. 2d 931-932;

Widney v. U. S., 178 F. 2d 883;

McKewen v. U. S., 165 F. 2d 761-765.

The intent of the husband to change the beneficiary of his insurance policy to his wife is not only supported by her testimony (Tr. 59) but is further supported by three separate statements, two oral (Tr. 49, 52-57) and one written (Tr. 61), that he had made his wife the beneficiary of this policy.

First. He told his wife that he intended to do so. (Tr. 59.)

Second. About two months before his death in a conversation about her insurance, and at that time, he told her "I have \$10,000.00 in government insurance in your name". (Tr. 59.) He also told Neil Baker, a fellow Sergeant with whom he was quartered at the

Non-Commissioned Officers Staff quarters at the El Toro Marine Base, that he, Gulley, had his National Service Life Insurance changed over to his wife's name (see deposition of Neil Baker and Reporter's Tr.).

Third. On February 5, 1947, Wallace Phillip Gulley, completed and signed a form provided by the U. S. Marine Corps and known as a "Confidential Statement"; upon completion of this Confidential Statement, it was sealed and delivered to the proper officers of the Marine Corps and there filed with the understanding between Gulley and the Government that it would not be opened except in the case of the death of the said Wallace Phillip Gulley. In the Confidential Statement the appellee Mary Jane Gulley was named as the beneficiary of the \$10,000.00 National Service Insurance Policy (Defendant's Exhibit "A").

The evidence mentioned in *First* established the necessary element of *intent*. The evidence under *Second* and *Third* not only corroborates the intent, but also established the affirmative acts required to effectuate the intent. Apparently Gulley and Baker each filled out their respective Confidential Statements required by Government at the U. S. Marine Corps Air Station at El Toro, California, on the same date, they having both been given the forms to complete at the same time. Neil Baker was a non-commissioned officer (Sergeant U.S.M.C.) and had no interest in the policy and was a truly disinterested witness, in spite of the reprehensible and speculative remarks in innuendo of adverse counsel.

There are two decisions by this Honorable Court wherein the facts in the cases were almost identical with the case on appeal, namely:

Kendig v. Kendig, 170 F. (2d) 750;

Downing v. Downing, 175 F. (2d) 40.

Appellee submits that these two cases are controlling, however, appellee submits that there are numerous other decisions from Circuit Courts which follow the same reasoning of this Honorable Court in cases of similar character, namely:

Roberts v. U. S., 4 Cir. (1946), 157 F. 2d 906;

Mitchell v. U. S., 5 Cir., 165 F. 2d 758;

McKewen v. McKewen, 5 Cir., 165 F. 2d 761;

Shapiro v. U. S., 2 Cir., 166 F. 2d 240;

Rosenschein v. Citron, D.C. Cir., 169 F. 2d 885;

Flood v. U. S., 3 Cir., 172 F. 2d 221;

Fairmakis v. Fairmakis, D.C. Cir., 172 F. 2d 291.

It is therefore respectfully submitted that the judgment of the United States District Court for Nevada should be affirmed.

Dated, September 1, 1954.

RIDLEY C. SMITH,

OLIVER C. CUSTER,

Attorneys for Appellee

Mary Jane Wauson,

formerly Mary Jane

Gulley.

